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No. 103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, *Appellant*

v.

ARMOUR & COMPANY and GENERAL HOST CORPORATION

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF FOR GENERAL HOST CORPORATION

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INDEX

	Page
Statement	1
A. The Background of the Case—United States v. Swift & Company	2
B. The Proceedings Below	5
Introduction and Summary	9
Argument	13
I. The 1920 Consent Decree Does Not Prohibit General Host From Owning a Controlling Stock Interest in Armour	13
A. The Plain Language of the 1920 Decree Does Not Restrict the Business Activities of Armour Stockholders Which, Like General Host, Were Not Parties to the Original Action	13
B. The Government and Armour Have Previously Interpreted the Decree as Permitting Those in Control of a Meat Packer to Engage in a Business Prohibited to the Packer Itself	18
C. The District Court's Interpretation Is Consistent With the Underlying Purpose of the Decree	23
II. The Government Is Unjustifiably Seeking to Modify the Swift Decree Without the Necessary Formal Modification Proceedings	27
III. The District Court's Decision Does Not Threaten the Integrity of the Swift Decree or of Judicial Decrees Generally	31
Conclusion	38

CITATIONS

Cases: Page

Admiral Mfg. Corp. v. Staff, 42 F.2d 872 (2d Cir. 1930) 28, 29
American Radium Co. v. Hygo Deposit Co., 279 Fed. 601 (S.D.N.Y. 1921), *aff'd*, 279 Fed. 1016 (2d Cir. 1922) 30
Arcade, Inc. v. Rugby Fabrics Corp., 302 F.2d 287 (2d Cir. 1962) 30
Arco Publications, Inc., 3 Trade Reg. Rep. ¶ 18,867 (F.T.C. July 15, 1969) 29
Baltz v. The Fair, 178 F. Supp. 699 (N.D. Ill. 1959), *aff'd*, 279 F.2d 899 (7th Cir. 1960) 29
Bloor v. Safety Transit Co., 50 F.2d 862 (4th Cir. 1931) 29
Brewer v. Hazle School District No. 46, 238 F.2d 91 (8th Cir. 1956) 30
Bullock v. United States, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959) 30
Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962), *aff'd*, 316 F.2d 374 (2d Cir. 1963) 26
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 24
Chas. Volland Pearl v. Vornell, 294 U.S. 440 (1934) 28
Chest Pump Corp. v. Schering Corp., 329 F.2d 745 (D.C. Cir. 1963) 30
Cooley v. Board, 321 U.S. 189 (1944) 26
Cooley v. United States, 254 F.2d 797 (6th Cir.), *cert. denied*, 358 U.S. 829 (1958) 30
Coral Water Co. v. United States, 333 U.S. 367 (1948) 29
Corrigan & Dennerlein Music Corp. v. Laird, 196 F.2d 627, (2d Cir. 1952) 31
Corporal Uniform & Flag Co., Inc. v. Rowe Co., 305 N.Y. 479, 113 N.E.2d 814 (1953) 24
Coral Pipe Line Co. v. Jacobson, 301 U.S. 412 (1937) 26
Dalehite v. U.S., 346 U.S. 15 (1953) 32
Dimensional v. Kappus Bros. Packing Co., Inc., 122 F.2d 147, (2d Cir. 1941) 31
Dunbar v. United States, 342 U.S. 282 (1952) 12, 22, 30, 31
Eastern v. Pittston, 245 F.2d 93 (6th Cir.), *cert. denied*, 355 U.S. 878 (1957) 26

Page

Kean v. Hurley, 179 F.2d 888 (8th Cir. 1950) 32, 35
Knecland v. Luce, 141 U.S. 437 (1891) 32
Laurlaw v. National Screen Serv. Corp., 349 U.S. 322 (1955) 32
Le Tourneau Co. v. NLRB, 150 F.2d 1012 (5th Cir. 1945) 32
Liquid Carbonic Corp. v. United States, 350 U.S. 869 (1955) *reversing* 121 F. Supp. 141, *as modified*, 123 F. Supp. 653 (E.D.N.Y. 1954) 12, 31
Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd sub nom., Delaware & Mississippi Valley Barge Line Co.* 389 U.S. 579 (1968) 26
In re Murray Realty Co., 35 F. Supp. 417 (N.D.N.Y. 1940) 17
National Licorice Co. v. NLRB, 309 U.S. 350 (1940) 35
New Standard Pub. Co. v. FTC, 194 F.2d 181 (4th Cir. 1952) 26
Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933) 21
Pennoyer v. Neff, 95 U.S. 714 (1878) 32
Power Reactor Dev. Co. v. IUE, 367 U.S. 396 (1961) 21
Realty Elec. Corp. v. Nassau Elec. Corp., 170 F.2d 914 (2d Cir. 1948) 34
Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945) 32
Sun Dial Pub. Co. v. United States, 366 U.S. 683 (1961) 34
Standard Brands, Inc. v. Zlotnick, 264 F. Supp. 254 (E.D. La. 1966) 26
Standard Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) 8
Sutherland v. Carson, 188 F.2d 841 (9th Cir. 1951) 31
Swift & Co. v. United States, 276 U.S. 311 (1928) 29
Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924) 28
Udall v. Tallman, 380 U.S. 1 (1965) 31
United Pharmacal Corp. v. United States, 306 F.2d 515 (1st Cir. 1962) 33
United States v. American Optical Co., 97 F. Supp. 62 (N.D. Ill. 1951) 37
United States v. American Soc'y of Composers, Authors & Publishers, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964) 28, 29

Page

United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 11, 21, 22, 31

United States v. Bayer Co., 105 F. Supp. 255 (S.D. N.Y. 1952) 12, 33, 34, 35

United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968) 28

United States v. Brown Shoe Co., 370 U.S. 294 (1962) 37

United States v. California Cooperative Canneries, 279 U.S. 553 (1929) 5

United States v. Carter Prods., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962) 35

United States v. Continental Can Co., 143 F. Supp. 787 (N.D. Cal. 1956) 27, 31

United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946) 35

United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 (1961) 29

United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957) 37

United States v. Grinnell Corp., 384 U.S. 563 (1966) 24

United States v. International Harvester Co., 274 U.S. 693 (1927) 29

United States v. National City Lines, Inc., 134 F. Supp. 350 (N.D. Ill. 1955) 27, 38

United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952) 6

United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943) 27

United States v. Standard Oil Co., 152 Fed. 299 (C.C.E.D. Mo. 1907), *aff'd*, 221 U.S. 1 (1911) 24

United States v. Swift & Co., 286 U.S. 106 (1932) 33

United States v. Swift & Co., Civil Action No. 58 C 643 (N.D. Ill.) 5, 11, 34

United States v. Swift & Co., 158 F. Supp. 551 (D.D.C. 1958) 1

United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) 2

United States v. W. T. Grant Co., 345 U.S. 629 (1953) 4, 5, 7, 14, 29

27

Page

United States v. *Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963) 36

United States v. *Western Elec. Co.*, 409 F.2d 1377 (1969), *cert. denied sub nom. Components, Inc.* v. *Western Elec. Co.*, 90 S. Ct. 152 (1969) 28

Wallina v. *Lacy*, 51 F. Supp. 1002 (D. Colo. 1943) 26

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 32, 33

MISCELLANEOUS:

Packers & Stockyards Act of 1921, 42 Stat. 159, 7 U.S.C. § 181 ff. 2

Sherman Act, Sections 1, 2, 15 U.S.C. §§ 1, 2 2

Sherman Act, Section 5, 15 U.S.C. § 5 ..... 5, 9, 33, 34

Clayton Act, Section 7, 15 U.S.C. § 18 ..... 12, 28, 37

28 U.S.C. § 1404(a) 2

Fed. R. Civ. P. 65(d) 32

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FTC, Food Investigation, Report on the Meat Packing Industry (1919) 3

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Note, *Developments in the Law: Injunctions*, 78 Harv. L. Rev. 994 (1965) 32

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BRIEF FOR GENERAL HOST CORPORATION

STATEMENT

This is a direct appeal from an order of the district court (App. 165) denying the Government's petition to make General Host Corporation (General Host) a party to the case of *United States* v. *Swift & Company, et al.*, Civil Action No. 58 C 611 (N.D. Ill.), and refusing to enjoin General Host from acquiring additional shares of stock in Armour & Company (Armour), or from taking any action to control Armour's affairs while General Host is engaged in businesses prohibited to Armour by the Meat Packers Consent Decree of 1920 (App. 28-43). The challenged order rested on the court's conclusion that the 1920 decree "does not

prohibit control of Armour & Co. by General Host," that "[n]o violation of the 1920 decree is threatened or imminent," and that, accordingly, the Government's petition set forth no ground for enjoining General Host or for making it a party to the action (App. 151-52). No stay pending appeal was sought by the Government, and General Host has since acquired a majority of the Armour stock.

A.

THE BACKGROUND OF THE CASE—UNITED STATES v. SWIFT & COMPANY

Half a century ago, on February 27, 1920, a petition was filed in the Supreme Court for the District of Columbia charging the then five largest meat packing corporations,[1] 50 of their principal officers, directors, and stockholders, and 80 subsidiary corporations with violating sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).[2] The suit was one response to three years of public concern about rising food prices.[3] It stemmed most directly from a presidentially ordered investigation by the Federal Trade Commission which had found that the five giant meat packers and their affiliates had conspired in restraint of trade, not only in meat but in food generally. By pools and acquisitions, the FTC report had charged, the packers had artificially inflated the price of meat; and the increasing vertical expansion of these packers, both forward

[1] Swift & Company, Armour & Company, Wilson & Company, Inc., Cudahy Packing Company, and Morris & Company.

[2] The case was transferred to the Northern District of Illinois in 1903 pursuant to 28 U.S.C. § 1404(a). *United States v. Swift & Co.*, 188 F. Supp. 551 (N.D. Ill.).

[3] A further response was the Packers & Stockyards Act of 1921, 42 Stat. 159, 7 U.S.C. § 181 ff.

and backward, threatened to interfere further with the free functioning of the food market.[4]

The thrust of the petition was that the meat packer defendants, through their officers, directors, employees, and other persons conspiring with them, had used their joint control of stockyards, terminal railroads, market journals, and other appurtenances of the packing business to monopolize interstate commerce in livestock, meat products, and other foods. (App. 4-27.)

The petition described in detail the effects upon commerce of the defendants' control of the stockyards to which cattle raisers brought their animals for sale to packers. According to the petition, such control enabled the packers to impose charges for housing, feeding, weighing, and otherwise caring for the livestock prior to slaughter, which increased the retail price of meat; to grant monopolies to rendering plants which used carcasses of animals who died from disease or accident; and to allot space to banks and cattle loan companies, upon which cattlemen were often dependent until sale of their stock, and to commission men, the brokers between cattle raisers and packers. Moreover, it was alleged that through ownership of the stockyards and contiguous lands, and of market journals, the defendants were able to limit the number and identity of their competitors and to control the flow of meat to market and hence its price. (App. 13-16.)

[4] *See generally* FTC, FOOD INVESTIGATION: REPORT ON THE MEAT PACKING INDUSTRY (1919); Virtue, *The Meat Packing Investigation*, 31 Q.J. Econ. 676 (1919). One Commissioner referred to the packing business as "the greatest single industry in the country." Statement of Commissioner William B. Glover, quoted in Morley, *Proposed Control of the Packers*, THE NATION, Vol. 109, July 19, 1919, at 79.

Turning to another means by which it was claimed that the defendants had illegally restrained trade, the petition asserted that the parent companies controlled substantially all of the facilities used to distribute meat to retailers, including intermediary warehouses and refrigerated railroad cars. These facilities, the petition alleged, were used by the defendants, with little increase in overhead, in the distribution of so-called substitute foods, such as fish, vegetables, fruits, cereals, dairy products, poultry, and eggs (App. 16-18). The advantages obtained by this secondary use of facilities already in existence permitted the packers "temporarily to fix prices [of substitute foods] so low as to gradually eliminate competition" (App. 21). Accordingly, the petition alleged, the defendants had monopolized certain food lines and were well on the way to monopolization of all (App. 21-22).

In its prayer for relief, the Government sought to enjoin the defendants from continuing any monopolization or restraint of trade in the purchase, sale, or distribution of livestock and other commodities then being handled by them, to require divestiture of stockyards, terminal railroads, public cold storage warehouses, and other facilities, to enjoin the corporate defendants from permitting their distributive facilities to be used for the distribution of substitute foods, and to require divestiture by all defendants of any interest in companies dealing in the substitute foods (App. 25-27).

On the same day that the petition was filed, answers were served denying its essential allegations and a consent decree was entered granting the Government much, but not all, of the relief sought in the petition (App.

28, 46).[5] Subsequently, pursuant to Paragraph Eighteenth of the decree, which authorizes the court to entertain applications by the parties "with respect to this decree" (App. 43), lengthy supplementary proceedings ensued, but the decree has never been modified.[6]

B.

THE PROCEEDINGS BELOW

This appeal is from an order dismissing a petition filed by the Government on January 20, 1969, assertedly "to prevent and restrain violation" of the Meat Packers Decree. The petition alleged that that decree perpetually enjoins Armour from engaging in certain food product businesses (*e.g.*, bread, flour, sugar, fresh milk, etc.); that General Host, which is engaged in several of the businesses prohibited to Armour, had "initiated and pursued a plan to acquire control of Armour by purchasing shares of the common stock of Armour," and that the anticipated "[c]ontrol of Armour by General Host will result in violation of the Decree entered in this cause on February 27, 1920, by causing Armour to be engaged in activities prohibited to it by the Decree." (App. 47-49.)

The petition asked that pursuant to section 5 of the Sherman Act (15 U.S.C. § 5) a summons be issued

[5] For example, none of the defendants was forbidden to deal in poultry and eggs, and the individual defendants were allowed to deal in cereals and grain products and to own up to 50 per cent of the stock of companies dealing in the substitute foods completely proscribed to the corporate defendants. *See United States v. Swift & Co.*, 189 F. Supp. 885, 892 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) ("*Swift III*").

[6] *United States v. Swift & Co.*, 286 U.S. 106 (1932) ("*Swift II*"); *United States v. Calcasieu Cooperative Canneries*, 279 U.S. 551 (1929); *Swift & Co. v. United States*, 276 U.S. 311 (1928) ("*Swift I*"); *Swift III*, *supra*.

trict court did not exceed the limitations of its power to prevent interference with the purposes of the decree by General Host, its ruling could not possibly be inconsistent with established principles which protect equity decrees from destruction, interference or frustration." (Govt. Brief at 12). Nor, similarly, can it fairly be said that the ruling below "invites general frustration of structural prohibitions in antitrust decrees through conglomerate takeovers." (Govt. Brief at 13). Whether the district court's decision is confined to the facts of this case and to the terms of the 30 year old decree, however, and simply does not have the far reaching and terrible implications advanced by appellants in the Government

I. On the critical threshold question of interpretation, the Government argues that the district court violated the "complete separation of the defendant packers from the general food industry" which the decree was first at 30, whether accomplished by a packer acquiring an interest in a food company, as in this case. Thus, according to the Government, General Host's control of Armour creates a forbidden "relationship" (Govt. Brief at 9), even though there is no provision in the decree which in terms prohibits a food company from acquiring controlling stock ownership of a meat packer. This interpretation the district court found "goes beyond the plain language of the decree [and] cannot be supported [by] logical extension of the decree." (App. 1a).

The district court's interpretation is clearly correct. It finds support not in the plain language of the decree which prohibits certain specified conduct and creates a complete structural bar against food companies controlling meat packers, but contrary to the Government's present theory, does not [illegible]

modify a consent decree. *United Carbon Corp. v. United States*, 350 U. S. 908 (1955); *Hughes v. United States*, 342 U. S. 353 (1952).

III. The correctness of the district court's interpretation of the decree meets the "straw man" from which the Government seeks to make the principal question in this appeal, namely, whether a court of equity has the power to protect its decrees from obstruction, interference or frustration. There being here no threatened violation or frustration of the old Mint Brokers decree, the question of power is not reached. In fact, a court of equity has broad power, ordinarily exhausted by the ruling below, to deal with new facts and conduct that jeopardizes its decrees. Upon notice and after proper hearing, it can modify the terms of the decree if such modification is necessary to secure the basic purposes of the decree. Upon notice and after proper hearing, it can add the new parties to the case and determine, as in *United States v. Rubber Co.*, 175 F. Supp. 905, 908 (N. D. Ohio 1959), that the newly added parties had engaged in the illegal conduct charged in the original complaint. There is no evidence, nor is there even an attempt by the Government in this case, to safeguard the due process rights of the non-parties and to proceed with well settled rules which limit the binding effect of judgments. These procedures must be followed before the broad powers of a court of equity to prohibit violations of decrees by non-parties who act in active concert with one or more of the defendants. Finally, if the attempted interference threatens significant anticompetitive effects it is open to the Government to proceed under section 1 of the Sherman Act, 15 U. S. C. § 1, which is designed to prevent anticompetitive effects in their inception and thus does not require proof of actual restraint of trade.

ARGUMENT.

I

THE 1930 CONSENT DECREE DOES NOT PROHIBIT GENERAL HOST FROM OWNING A CONTROLLING STOCK INTEREST IN ARMOUR.

A. The Plain Language of the 1920 Decree Does Not Restrict the Business Activities of Armour Stockholders Which, Like General Host, Were Not Parties to the Original Action.

Presented with the Government's "complete separation" theory, the same district judge who had previously rejected the defendants' attempt to modify the 1920 decree ruled that "[t]he interpretation of the decree for which the Government contends goes beyond the plain language of the decree. It cannot be considered a logical extension of the decree." (R. 21, App. Pet.) Examination of the terms of the decree demonstrates the correctness of this conclusion.

Paragraphs Fourth and Eighth of the decree, on which the Government's argument relies, are directed to the allegations of the petition that the large meat packers had improperly used "the advantages afforded by their meat distributing facilities to distribute other foods," "with comparatively no increase of overhead", thus permitting them "to push sales" and "temporarily to fix prices so low as to gradually eliminate competition." (App. 31.) As the district judge found, "[t]he principal purpose for the provisions in issue [Paragraphs Fourth and Eighth] was to restrict the corporate defendants in the use of the vast power they had acquired to extend their power into other markets." (R. 21, App. Pet. App. 17a.)

Consistent with this purpose, Paragraph Fourth of the decree provides:

> "That the corporation defendants and each of them be and they are hereby perpetually enjoined and restrained from . . . either directly or indirectly, by themselves or through their officers, directors . . .

> agents, or servants, engaging in or carrying on, either in concert of action or otherwise, . . . the manufacturing, jobbing, selling, transporting (except as common carriers), distributing, or otherwise dealing in . . .

a number of non-meat foods and miscellaneous products (Appx. 30-33). It further enjoins the corporation defendants from owning, either directly or through their officers, directors, agents, or servants, stock or any other interest in the firm or corporation engaged in the specified business (Appx. 33-34). Essentially identical provisions in Paragraph Eighth prohibit the corporate defendants from engaging in trade in fresh milk and cream (Appx. 37-38).

These provisions are clear. The corporate defendants may not deal in the specified articles, either directly or indirectly—that is, through their officers, directors, agents, or servants acting on their behalf or through subsidiary corporations. However, Paragraphs Fourth and Eighth make no mention of stockholders of the packers, whether individuals or corporations, and thus on their face restrict the businesses in which such stockholders may be engaged.

Relying on the language of the decree, the court found that "[t]he omission of stockholders . . . from the prohibitions in paragraph fourth evidences an intent that only the corporate defendants and those acting on their behalf be enjoined in that paragraph" (Pet. App. 14a). The Government's contention that Paragraphs Fourth and Eighth bind Armour from having any . . . [illegible] with corporations like Mineral Point (Appx. 1) that it does not completely control simply has no support in the language of the decree itself.

The decree's limited restrictions on activities of the individual defendants, several of whom were controlling stockholders of meat packer corporations, provide further proof that the decree was not designed to prevent the packers "from having any ownership relation with" corporations engaged in the grocery business. Certain individuals who were large stockholders of defendant companies were named as defendants because, through their substantial financial interests in stockyards, terminal railways, and other institutions connected with the stockyards, and their control of the subsidiary corporations dealing in the substitute foods, these individuals had enabled the corporate defendants to carry out the alleged restraints of trade and attempted monopolization. (App. 24-25).

Paragraph Fifth of the decree limits the interests these individual defendants may hold in companies engaged in certain of the product lines forbidden to Armour by Paragraph Fourth. Significantly, Paragraph Fifth does not entirely preclude the individual defendants from engaging in those businesses but merely enjoins them from owning 50 per cent or more of the effective voting stock of corporations trading in the prohibited articles (App. 31-32). The final paragraph of Paragraph Fifth clearly indicates the purpose of the restrictions on the individual defendants. It enjoins these defendants

> from individually or jointly, either directly or indirectly, by themselves or through their agents, servants, or employees, adopting any device or arrangement, which by reason of the relation of said individual defendants or any of them to the corporation defendants or any of them would have the purpose or effect of giving to such business of dealing in the articles hereinabove . . . men-

> tioned . . . , in which business such individuals or any of them may be substantially interested, an advantage over their competitors similar in purpose or effect to any advantage now enjoyed by any of the corporation defendants through their distributing system (App. 36).

Thus, the decree permits an individual defendant, who may be a controlling stockholder of a meat packer, also to own effective control of a corporation dealing in a substitute food product, provided he does not arrange his connection with the packers to give the substitute food company an advantage over its competitors.

In sum, the specific provisions of the 1920 consent decree purport to affect the outside activities of non-defendant stockholders of the meat packers, and not even the defendant shareholders were completely prevented from engaging in the businesses forbidden to the packers themselves. The decree, therefore, does not, in terms, bar a non-defendant stockholder, individual or corporate, from engaging in the substitute food business; nor, contrary to the basic premise of the Government's argument, does it erect a complete structural separation of meat packer and other food industry.

[illegible]

B. The Government and Armour Have Previously Interpreted the Decree as Permitting Those in Control of a Meat Packer To Engage in a Business Prohibited to the Packer Itself.

Further support for the district court's construction of the decree is found in the Government's long acquiescence, with full knowledge, in the joint control by the Prince family interests of both Armour and the Chicago stockyards. Since the provision in Paragraph Second of the decree forbidding meat packers to own stockyards is in its language essentially identical to Paragraph Fourth, which forbids meat packers to engage in the grocery trade, this continuous interpretation of the stockyard clause by the agency charged with enforcement of the decree is persuasive evidence that no complete structural separation of meat packers, stockyards, and substitute food interests was intended.

The uncontested facts regarding the interlocking relationship between Armour and the stockyards, through the Prince family, as of the close of 1968, are as follows (App. 128-32):

Pursuant to Paragraph Second of the 1920 decree, Armour was compelled to divest itself of the Union Stock Yard & Transit Co., which operates the Chicago public stockyards and associated businesses such as restaurants (App. 129, 132). This stockyard company owned directly 12,600 shares of Armour common stock, and itself was wholly owned by F. H. Prince & Co., Inc., which owned, either directly or through other subsidiaries, over 356,000 shares of Armour common stock (App. 130). Moreover, the stock of F. H. Prince & Co., Inc. was owned by the Frederick H. Prince Trust of 1932, a trustee and income beneficiary of which was William Wood Prince, Chairman and Chief Executive

Officer of Armour (App. 129). This trust and other related trusts, and Mr. Prince directly, owned additional shares of Armour stock (App. 130-31). The Prince trusts and the officers and directors of Armour working under Mr. Prince controlled approximately 13 per cent of the outstanding common stock of that company (App. 131).

Nor was the connection between Armour and the Union Stock Yard & Transit Co. solely one of joint ownership. In addition to being Chairman and Chief Executive Officer of Armour, Mr. Prince served as President and director of F. H. Prince & Co., Inc., which owned the stockyard company. James Donovan was a director and member of the executive committee which controlled the daily operations of Armour, as well as Chairman of the Union Stock Yard & Transit Co., vice-president and director of F. H. Prince & Co., Inc., and a co-trustee of the Frederick H. Prince trust. Charles Potter was a director and member of the executive committee of both Armour and F. H. Prince & Co. and was president of the stockyard company (App. 129).

It thus is not disputed that until General Host's exchange offer, the management of Armour owned, directly or indirectly, effective control of both Armour and certain public stockyard companies and restaurants, and that there was substantial interlocking of directorates.

Paragraph Second of the decree prohibits

> the defendants . . . from owning, either directly or indirectly, individually or by themselves, or through their officers, directors, agents or servants, any capital stock or other interest whatsoever in any public stockyard market company in the United States . . . . (App. 29)

This paragraph was at least as important a part of the relief afforded by the consent decree as were the similarly-worded Paragraphs Fourth, Fifth, and Eighth. The great concern of the complaint with the effects upon commerce of the control of stockyards by the packers and individuals associated with them is evident, for a substantial portion of the complaint was devoted to a description of how ownership of the stockyards permitted the packers to restrain trade in meat (App. 13-16; *see* pp. 3-4, *supra*).

There is no difference in principle between the Princes' control of the stockyards (forbidden to Armour by Paragraph Second of the decree) and General Host's control of a substitute food business (forbidden to Armour by the substantially identical language of Paragraph Fourth), for in both cases those holding control of Armour are engaged in businesses forbidden to Armour itself.

The Government has never denied that it has been aware of the interlocking ownership of Armour and the stockyards since at least the 1958-60 modification proceedings (App. 132). Nor has it denied that no proceeding was ever instituted based on the theory that the decree mandated "complete separation" of meat packer and stockyards interests (*Ibid.*). Thus, the record provides ample foundation for the district court's unchallenged finding that

> [t]he decree has not been construed to limit the business activities of non-defendant Armour stockholders nor to charge Armour with engaging in the businesses in which its controlling stockholders are engaged (F. 20, App. 150).

The Government apparently admits that its position in the current proceeding against General Host con-

stitutes a departure from its previous interpretation of the 1920 decree, for it refers to its "present theory of the decree" (Gov't Brief at 28). But this Court has held that when, over a substantial period of time, the Government interprets a consent decree to permit certain conduct, it may not suddenly reinterpret the decree to make that conduct unlawful. *United States* v. *Atlantic Refining Company,* 360 U.S. 19 (1959). The rationale for this principle is, reasonably, that in determining the scope of a consent decree the interpretation given by its signatories is entitled to great weight,[10] and a later change in construction suggests that the signer is attempting to modify the decree sub silentio. *Id.* at 23.

In an attempt to avoid the effect of its past interpretation of the 1920 decree, the Government argues that its "failure to act in that situation hardly constituted an authoritative construction of the decree" and that it did not create an "estoppel" as to General Host (Gov't Brief at 28-29). In so contending, the Government completely disregards the fact that a similar argument was made and rejected in *Atlantic Re-*

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[10] Analogous is the principle that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *Power Reactor Dev. Co.* v. *IUE,* 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315 (1933). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman, supra,* 380 U.S. at 16.

fining, where this Court refused to permit the Government to renounce its "long-standing acquiescence and [claim] that the decree imposed limits it had not previously sought to enforce." 360 U.S. at 23.

Furthermore, in *Atlantic Refining* this Court held that the Government's contention that its new interpretation would more nearly effectuate "the basic purpose" of the statutes to which the decree related

> does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that. Cf. Hughes v. United States, 342 U.S. 353. . . .
>
> We . . . hold that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. 360 U.S. at 23-24 (footnotes omitted).

In its discussion of the connection between Armour and the stockyards the Government utterly ignores *Atlantic Refining* (Gov't Brief at 28-29). Its only citation of the case comes at the end of a subsequent paragraph, in an inaccurate attempt to distinguish the case as involving a petition for modification of a consent decree (Gov't Brief at 29 n. 18). The force of *Atlantic Refining* is inescapable, and the Govern-

ment's continuous interpretation of the Meat Packers Decree over a long period of time is strong authority that the decree was not meant to prevent those in control of a meat packer from engaging in businesses proscribed to the packers themselves.

Finally, it is no answer at all that the Prince family were individual shareholders whereas General Host is a corporation, for, in this context, individuals as well as corporations could forge anticompetitive interlocking relationships. Indeed, the very allegations of the petition to which the stockyards clause of the decree responds referred to the efforts of the "parent companies *and their controlling heads*" to obtain control of stockyards and their appurtenances (App. 19-20, emphasis added); and the stockyards clause itself extends to all defendants, individual as well as corporate. The real reason for allowing the Prince interests to control stockyards businesses was that, like General Host, they were the controlling shareholders of Armour, not Armour itself, and as such, under any reasonable reading of the decree, were not bound by its provisions.

C. The District Court's Interpretation Is Consistent With the Underlying Purpose of the Decree.

As we have shown, the *Swift* petition was prompted by a history of anticompetitive activities by the corporate and individual defendants. The purpose of the action was to divest the meat packers and those who controlled them of the means by which they had obtained a near monopoly in the wholesaling of meats and threatened to monopolize the entire food industry.

Settlement of the case gave the Government essentially all the relief it requested. The corporate pack-

ers were divested of their stockyards, terminal railroads, market journals, and substitute food companies, and were forbidden to re-enter these lines of commerce, either directly or through agents acting for them. Similarly, the individual defendants, through whom the corporations had acted to restrain trade in meat and other food products, were directed to divest themselves of the stockyards and some other companies which had been the instruments of the corporate defendants' anticompetitive practices. However, as we have shown, the decree permitted controlling stockholders of the meat packers to own effective control of related businesses, provided they did not misuse their connections with the packers to favor their outside interests.

It is evident that insofar as the 1920 decree directed structural relief it was intended to prevent the resumption of anticompetitive activities undertaken by the defendants in the past. "Prophylactic separation", to use the Government's phrase, was decreed only to the extent that a past proclivity to violate the law had been demonstrated. Such structural relief is common where past conduct has demonstrated the desirability of preventing even the opportunity for abuse. *See, e.g., Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129 (1967); *United States* v. *Grinnell Corporation*, 384 U.S. 563, 577-80 (1966).

But prophylactic structural separation is not necessary where there has been no demonstrated threat to competition. Neither in 1920 nor in the proceedings here appealed did the Government attempt to show that ownership of packer stock by a corporation such as General Host, engaged in the general grocery trade, would constitute a threat to free competition in any

line of commerce, and neither General Host nor any similar corporation has demonstrated by past misconduct a dangerous proclivity to misuse the opportunity theoretically presented by its stock ownership in Armour or in any of the packers. As the district court found,

> [t]he principal reason for the provisions in issue was to restrict the corporate defendants in the use of the vast power they had acquired to extend their power into other markets. The situation which the Government challenges here, however, is substantially different from that with which the 1920 decree was concerned. General Host is not a large meat packer extending its monopolistic grasp toward the rest of the food industry and through the use of its already established distributing facilities, superior financial resources and other means making a dominant position felt, resulting in a restraint of trade by squeezing out present or potential competitors. . . . (F. 24, App. 150-51.)

Since General Host is thus wholly unlike the corporate and individual defendants, lacking both comparable market power and a history of past monopolistic abuse, the structural prohibitions of the decree were not meant to, and do not, apply against it. On the other hand, General Host and the court were both well aware that the decree's prohibitions still apply to Armour and would apply also to General Host were it to engage in forbidden activities in concert with Armour. Thus, General Host's president asserted that "Armour and General Host will continue to be operated as separate companies, each for the benefit of its respective stockholders. Armour will continue to be subject to the provisions of the Packers' Consent

Decree and General Host, once its representatives assume actual control of Armour, will be obliged to, and will see, that Armour does not engage in businesses forbidden to it by the Decree." (App. 65.) And the court, concerned that Armour continue to abide by the provisions of the decree when under the aegis of General Host, assured the Government that upon proper application it would promptly enjoin any representatives of General Host, who, as directors of Armour, might cause Armour to engage in the prohibited businesses, for example, by "running super markets or retail butcher stores" (App. 159, 162). But it was not even claimed that General Host intended to take any such action.

"[I]t is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do." *New Standard Publishing Company* v. *FTC*, 194 F.2d 181, 183 (4th Cir. 1952).[11] In view of the plain language and the purpose of the 1920 decree, there was no basis presented to the court on which it could properly issue an injunction against General Host. Armour would not be in violation of the decree merely by being owned by General Host, and the record is devoid of any suggestion that General Host's representatives might cause Armour to enter the forbidden fields. In these circumstances, the dis-

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[11] *Accord*, *Blease* v. *Safety Transit Co.*, 50 F.2d 852 (4th Cir. 1931); *Standard Brands, Inc.* v. *Zumpe*, 264 F. Supp. 254 (E.D. La. 1966); *Carroll* v. *Associated Musicians*, 206 F. Supp. 462, 478 (S.D.N.Y. 1962), *aff'd*, 316 F.2d 574 (2d Cir. 1963); *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo. 1943); *cf. Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *Great Atl. & Pac. Tea Co.* v. *Grosjean*, 301 U.S. 412, 429-30 (1937).

trict court properly declined to enter an injunction against General Host.[12]

II.

THE GOVERNMENT IS IMPERMISSIBLY SEEKING TO MODIFY THE SWIFT DECREE WITHOUT THE NECESSARY FORMAL MODIFICATION PROCEEDING.

At the time the 1920 consent decree was negotiated, no one contemplated that a food company might one day acquire one of the large and powerful meat companies. The problem was the meat companies and their controlling shareholders, and they were made the subject of both behavorial and structural relief. No similar relief was imposed against food companies, and no provision was included to preclude grocery company ownership of a meat packer. In these circumstances, the Government's attempt to prevent General Host's control of Armour is, in effect, an attempt to modify the decree.

The courts, however, have consistently refused to modify decrees in summary proceedings purporting to seek only construction of those decrees. For example, in *United States* v. *Continental Can Company*, 143 F. Supp. 787 (N.D. Cal. 1956), where the Government moved for an order construing a final judgment, the court looked to the record relating to the entry of the decree and to the language of the decree itself to determine what the decree encompassed. Pointing out that "[a] judgment is limited in its application

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[12] *Cf. United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326 (1952); *United States* v. *National City Lines, Inc.*, 134 F. Supp. 350, 361-62 (N.D. Ill. 1955), holding that an injunction is inappropriate where there is no reasonable possibility that abandoned conduct will be resumed.

to the issues actually presented by the pleadings and intended to be adjudicated at the time of entry"[13] the court rejected the proposed interpretation and suggested that if the Government feared anticompetitive effects from the proposed acquisition it could begin a new proceeding under section 7 of the Clayton Act, 15 U.S.C. § 18."[14]

The 1920 consent decree was "obviously the product, in principal part, of extensive negotiation between the defendants and the Government and is a detailed and carefully worded decree" (App. 150). A consent decree such as this inherently embodies a compromise, and thus may well not provide all the relief which the Government would request were the case to go to trial. *See United States* v. *Blue Chip Stamp Company*, 272 F. Supp. 432, 440 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Company* v. *United States*, 389 U.S. 580 (1968). As this Court has recognized, "the circumstances surrounding . . . negotiated agree-

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[13] 143 F. Supp. at 789.

[14] *Accord, United States* v. *Western Elec. Co.*, 409 F.2d 1377, 1379 (1969), *cert. denied sub nom. Components, Inc.* v. *Western Elec. Co.*, 90 S.Ct. 152 (1969); *United States* v. *American Soc'y of Composers, Authors & Publishers*, 331 F.2d 117 (2d Cir.) *cert. denied*, 377 U.S. 997 (1964); *Standard Oil Co.* v. *Clark*, 163 F.2d 917, 930-31 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948), where the court reiterated that the specific provisions of a consent decree should be read in light of the decree's general purpose. *Cf. Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17, 29 (1924):

> In contempt proceedings for its enforcement, [an antitrust] decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read.

ments are so different that they cannot be persuasively cited in a litigation context." [15] Relief directed on consent of the parties, where there has been no judicial finding of violation of law, need not be—and typically is not—as extensive as that which might have been ordered after trial.

The Government's argument, in essence, is that this decree, entered on consent in 1920, should be interpreted to include relief on which it would insist were the decree being negotiated today. However, having agreed to less than all the relief to which it might have been entitled after a trial, the Government cannot now obtain expansion of the decree beyond its terms. *Ford Motor Company* v. *United States*, 335 U.S. 303, 320, 322 (1948); *United States* v. *International Harvester Company*, 274 U.S. 693, 702-03 (1927); *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1953); *see Swift I*, *supra*, 276 U.S. at 327; *United States* v. *American Society of Composers, Authors & Publishers*, *supra*, 331 F.2d at 123-24. The Government, as much as the defendant, is bound by the terms of the consent decree.

A consent decree, although a judicial act, is analogous to a contract in that the "court is not at liberty to substitute its judgment upon the question whether the injunction as entered in 1920 was in accord with equitable principles under the circumstances then prevailing." *Swift III*, *supra*, 189 F. Supp. at 904.[16]

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[15] *United States* v. *E. I. du Pont de Nemours & Co.*, 336 U.S. 316, 330 & n.12 (1961).

[16] *See* Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 Mich. L. Rev. 1051, 1057-58 (1958).

Such a decree is limited to its four corners, and, unless a formal modification proceeding is undertaken, is not subject to expansion or contraction by the court. *Dart Drug Corporation* v. *Schering Corporation*, 320 F.2d 745 (D.C. Cir. 1963); *Artvale, Incorporated* v. *Rugby Fabrics Corporation*, 303 F.2d 283 (2d Cir. 1962); *American Radium Company* v. *Hipp. Didisheim Company*, 279 Fed. 601, 603 (S.D.N.Y. 1921), *aff'd*, 279 Fed. 1016 (2d Cir. 1922).

The Government's effort in this case to expand the 1920 decree to affect the outside business activities of Armour's controlling shareholders is an impermissible attempt to modify the decree sub silentio, similar to that rejected by this Court in *Hughes* v. *United States*, 342 U.S. 353 (1952). There, too, the Government asked the Court to construe a consent decree "so as to achieve the purposes of the entire . . . decree",[17] the thrust of which, it claimed, was to divorce production-distribution companies from theater exhibition companies. The construction sought by the Government would have required Hughes, who owned stock in both types of company, to sell one type of stock. Although recognizing that this single ownership might well impede competition, the Court declined to adopt the Government's interpretation of the decree, for it found "no fair support for reading that requirement into the language of" the decree.[18] Moreover, the Court refused to order modification of the decree either under the provision reserving power to amend or under the inherent equity powers of the Court, since Hughes had not been heard on the question whether sale of one

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[17] 342 U.S. at 357.

[18] *Ibid.*

block of stock was required to effectuate the purposes of the decree. *Accord, Liquid Carbonic Corp.* v. *United States,* 350 U.S. 869 (1955), *reversing* 121 F. Supp. 141, *as modified,* 123 F. Supp. 653 (E.D.N.Y. 1954); *Unitea States* v. *Continental Can Company, supra.*[19]

III.

THE DISTRICT COURT'S DECISION DOES NOT THREATEN THE INTEGRITY OF THE SWIFT DECREE OR OF JUDICIAL DECREES GENERALLY.

The Government has raised up a straw man by suggesting in Part I of its Argument that the decision appealed from erodes the power of courts of equity to implement and enforce their decrees. The argument misconceives the nature of the district court's ruling. The court did *not* hold that it was without power to protect its decrees in appropriate circumstances, but only that the *Swift* decree was not in jeopardy, since that decree, as presently constituted, does not prohibit control of Armour by a company such as General Host. The validity of this construction of the decree has been demonstrated above, in Parts I and II of this Argument.

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[19] We do not understand the Government's attempted distinction of cases such as *Atlantic Refining, Hughes,* and *Liquid Carbonic.* The citation of these cases in appellant's Brief at 29 n.18, suggests that they dealt with petitions for modification of consent decrees. The facts are quite the contrary—these cases involved Government petitions purportedly for *construction* of consent decrees, in circumstances where the Court held that the "constructions" sought by the Government were in effect *modifications* of the terms of the decrees. For this reason, and since no hearings on the necessity for modification had been held, the Court declined in each case to adopt the Government's suggested "constructions". These cases are, therefore, indistinguishable from that now before the Court.

It is therefore unnecessary for this Court to reach the question posed by the Government as to what remedies are available to a court to protect its decrees from interference by non-parties. In fact, however, the decision below does not limit the broad powers of a court of equity to deal with such conduct. There are several courses open to a court faced with a non-party's threat to the integrity of its decree, each of which—unlike the procedure chosen by the Government in this case—affords the traditional safeguards of due process to a non-party against whom enforcement of an existing decree, to which it is not privy, is sought.[20]

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[20] Under the common law and the Federal Rules of Civil Procedure, an injunction is binding only upon the parties to the action, their privies, and persons in active concert or participation with them. FED. R. CIV. P. 65(d); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322 (1955); *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940); *Kneeland* v. *Luce*, 141 U.S. 437 (1891); *see Pennoyer* v. *Neff*, 95 U.S. 714 (1878); *Baltz* v. *The Fair*, 178 F. Supp. 691, 694 (N.D. Ill. 1959), *aff'd*, 279 F.2d 899 (7th Cir. 1960). Privies are those "so identified in interest with another as to represent the same legal rights", *Baltz* v. *The Fair*, *supra*, 178 F. Supp. at 693; *accord*, *Chase National Bank* v. *Norwalk*, 291 U.S. 431 (1934), and are bound by the decree in order "that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945); *see Avon Publications, Inc.*, 3 TRADE REG. REP. ¶ 18,086 (F.T.C. July 15, 1969). *See generally* 7 MOORE, FEDERAL PRACTICE ¶ 65.13 (2d ed. 1968); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1028-31 (1965). Insofar as a decree purports to affect the actions of persons who are neither parties, privies, nor in concert, it is ineffective. *Chase National Bank* v. *Norwalk*, *supra*; *Swetland* v. *Curry*, 188 F.2d 841 (6th Cir. 1951); *Le Tourneau Co.* v. *NLRB*, 150 F.2d 1012 (5th Cir. 1945); *Kean* v. *Hurley*, 179 F.2d 888 (8th Cir. 1950); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832 (2d Cir. 1930); *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*.

Under these long-established principles, a judgment against a corporation, such as Armour, does not bind its stockholders, such

One course open to the court, if its decree were in fact threatened by General Host's proposed acquisition of Armour, was to add General Host as a party to the *Swift* case in order that it might participate in a modification proceeding to determine whether the purposes of the decree and the present competitive situation required an injunction against such a company owning packer stock.[21] The Government did not seek modification, however, undoubtedly because it felt it could not make the "clear showing of grievous wrong evoked by new and unforeseen conditions" which this Court has held is necessary before it will "change what was decreed after years of litigation with the consent

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as General Host, unless the litigation was controlled or participated in by the stockholders. *E.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra; Foreign & Domestic Music Corp.* v. *Licht*, 196 F.2d 627 (2d Cir. 1952); *Hornstein* v. *Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143 (3d Cir. 1943).

The Government does not directly contest the correctness of the district court's conclusion, based on accepted principles, that

> General Host is neither a party, privy to a party nor in active concert or participation with a party to the consent decree entered in this case in 1920 and, therefore, is not bound by its provisions. (C.L. 2, App. 151.)

Moreover, the Government concedes that General Host is not in privity with any of the parties to the *Swift* decree so as to be bound by its provisions (Gov't Brief at 13-14) and does not contend that General Host was acting in "active concert or participation" with any of the parties to the decree (*see* pp. 25-26 *supra*).

[21] Had it done so, section 5 of the Sherman Act, 15 U.S.C. § 5, would have authorized the service of process on General Host out of the jurisdiction and its addition as a party to the case. Section 5, however, is merely jurisdictional, *see United States* v. *Standard Oil Co.*, 152 Fed. 290 (C.C.E.D. Mo. 1907), *aff'd*, 221 U.S. 1 (1911), and does not authorize the court to enter an existing decree against a new party without a hearing on the merits of the original complaint. *United States* v. *Bayer Co.*, 105 F. Supp. 955 (S.D.N.Y. 1952).

of all concerned." *Swift II, supra,* 286 U.S. at 119. The petition and argument below were based exclusively on the theory that General Host should be enjoined from acquiring Armour stock because that acquisition would violate the 1920 decree as presently framed. Significantly, the Government's request was that General Host be subpoenaed "to appear and answer the allegations contained in this petition", that is, the petition for injunction filed January 20, 1969 (App. 49). The district court correctly ruled that the proposed joint ownership would not violate the 1920 decree and for this reason declined to add General Host as a party to the case.

Second, the court could have added General Host as a party to the original *Swift* petition, pursuant to section 5, for the purpose of determining, after a full hearing, whether General Host had participated in the unlawful conduct alleged therein and whether for that reason it should be enjoined from acquiring control of Armour. Such a procedure was followed in *United States* v. *Bayer Company,* 105 F. Supp. 955 (S.D.N.Y. 1952),[22] where the court held that a newly added defendant, not in privity with any of the parties to the original action, could not be bound by the provisions of a previously-entered consent decree, and that the Government must prove the new party's actions unlawful before a judgment to that effect could be entered.[23] *Accord, e.g., Raylite Electric Corporation* v. *Noma Electric Corporation,* 170 F.2d 914 (2d

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[22] *Cf. Sam Fox Pub. Co.* v. *United States,* 366 U.S. 683 (1961).

[23] *Accord, General Aniline & Film Corp.* v. *Bayer Co.,* 305 N.Y. 479, 113 N.E. 2d 844 (1953). The federal consent decree involved in *Bayer* had declared violative of the antitrust laws a contract of which General Aniline was assignee; neither General Aniline nor its assignor had been party to the original case. When General

Cir. 1948); *United States* v. *Carter Products, Incorporated*, 211 F. Supp. 144 (S.D.N.Y. 1962); *see National Licorice Company* v. *NLRB*, 309 U.S. 350, 363-66 (1940); *United Pharmacal Corporation* v. *United States*, 306 F.2d 515 (1st Cir. 1962); *Kean* v. *Hurley*, 179 F.2d 888 (8th Cir. 1950); *Alemite Manufacturing Corporation* v. *Staff*, 42 F.2d 832 (2d Cir. 1930); *United States* v. *Dean Rubber Manufacturing Company*, 71 F. Supp. 96 (W.D. Mo. 1946).

These generally accepted procedures were available to the court below had it anticipated any interference with its 1920 decree. Unlike the short-cut attempted here by the Government, these methods are consistent with the traditional rules limiting the effect of *in personam* judgments to parties and privies. They secure to a non-party the right, inherent in due process,

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Aniline sued in state court to enforce its rights under the contract, the Government filed a petition in the federal court to add General Aniline to that case and to enjoin prosecution of the state contract action on the ground that the state suit acted "to defeat the jurisdiction of" the federal court and "to obstruct and thwart the effectuation of the" consent decree.

The Government concedes that under the teaching of *Bayer* a newly added party is not "*ipso facto*" bound by a decree entered before its appearance in an antitrust case (Gov't Brief at 19 n.13), and does not attempt to suggest how the *Swift* decree could be entered against General Host without a hearing on the merits of the 1920 petition. The Government's implicit suggestion that the decree should bind General Host without a full hearing is precisely the contention that was rejected by the court in *Bayer*, where the court said:

> . . . United States of America, the plaintiff herein, by its supplemental complaint goes far beyond merely bringing General into the anti-trust proceeding. It seeks to have the decree, entered on the consent of Bayer, . . . declared binding on General. To that extent, General's objection [to the supplemental complaint] is well founded. 105 F. Supp. at 957.

to be heard before a decree is entered that affects its rights.[24]

Having conceded that General Host is not "bound by the Meat Packers Decree *as presently written*" (Gov't Brief at 13) (emphasis added), the Government has failed to explain satisfactorily how it could avoid following one or the other of these procedures. The cases upon which it relies (Gov't Brief at 17) to avoid the principles relating to privity to which it accedes are inapposite, for they involve either injunctions issued pendente lite,[25] injunctions issued against persons acting in concert with parties to the original decrees,[26] or the sui generis problem of interference with school desegregation orders.[27] The propriety of a desegregation order is not fairly open to question any more, and thus in the cases cited by the Government

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[24] Of course, a court of equity may also act summarily to prevent a non-party acting in active concert with a party from violating its decree.

[25] *E.g.*, *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *United States* v. *Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963).

[26] *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.) *cert. denied*, 360 U.S. 909 (1959); *Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd sub nom. Osbourne* v. *Mississippi Valley Barge Line Co.*, 389 U.S. 579 (1968). The dictum from this last case quoted by the Government in its Brief, at page 17, note 11, when read in context, clearly applies only to privies to the original parties.

[27] *Faubus* v. *United States*, 254 F.2d 797 (5th Cir.), *cert. denied*, 358 U.S. 829 (1958), where the supplemental petitions against Governor Faubus apparently charged him with substantive violations of the plaintiffs' constitutional rights, as well as with interference with the court's desegregation order (*see* 254 F.2d at 805). *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) did not involve interference with an order of a court, but merely interference with voluntary desegregation.

there was in fact little for the new parties to litigate with respect to the merits of the underlying complaints. In the instant case, however, no attempt has even been made to show the effect upon competition of General Host's ownership of Armour stock in either 1920 or 1970.

Finally, if the Government fears that competition may be injured by General Host's ownership of Armour, it may file a new and distinct complaint, charging that this acquisition violates section 7 of the Clayton Act, 15 U.S.C. § 18, and seeking appropriate injunctive relief. Such a case might be brought as a class action, thus authorizing the court to enter a decree that would affect other grocery firms as well.[28] In actions under section 7, of course, the Government need not prove an existing restraint of trade but merely a probability of anticompetitive effect,[29] and thus may reach restraints of trade in their incipiency. Moreover, since such an action may be filed at any time,[30] relief is still available to the Government should General Host's control of Armour in fact threaten competition in any line of commerce in any section of the country at any time in the future.

In any event, we emphasize that the decision of the district court was not that it lacked power to protect the integrity of the *Swift* decree, but merely that the *Swift* decree did not prohibit the ownership of Armour stock by a company such as General Host. We submit that antitrust decrees are not constitutions to be broadly

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[28] *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951).

[29] *United States* v. *Brown Shoe Co.*, 370 U.S. 294 (1962).

[30] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

interpreted to meet changed conditions without resort to the procedures described above. *See United States v. National City Lines, Incorporated,* 134 F. Supp. 350 (N.D. Ill. 1955).

CONCLUSION

Since the district court properly ruled that the 1920 *Swift* decree does not prohibit ownership of Armour stock by a corporation such as General Host, its judgment should be affirmed.[31]

Respectfully submitted,

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February 19, 1970

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[31] If this Court reverses, it does not follow—as the Government urges (Gov't Brief at 33 n.22)—that no further hearing is required. General Host has never been heard on its defenses relating to the extent to which its businesses or properties are listed in the decree (App. 57).